COMPELLING THE PRODUCTION OF CORPORATION BOOKS AND PAPERS.—Hale, the plaintiff in the case of *Hale* v. *Henkel, supra,* was served with a *subpoena duces tecum,* commanding him to produce before the grand jury all contracts, memoranda, correspondence, reports, letters, etc., having to do with the business of the MacAndrews & Forbes Company. He pleaded immunity from the operation of the subpoena under the 4th amendment, which prohibits unreasonable searches and seizures. The Court held that an order for the production of books and papers may constitute an unreasonable search and seizure within the 4th amendment. "While a search ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner, still, as was held in the *Boyd Case* [*Boyd* v. *United States,* 116 U. S. 616] the substance of the offense is the compulsory production of private papers, whether under a search warrant or a *subpoena duces tecum,* against which the person, be he individual or corporation, is entitled to protection. Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. . . A general subpoena of this description is equally indefensible as a search warrant would be if couched in similar terms."

MR. JUSTICE MCKENNA, in a concurring opinion, dissented from the opinion of the court in all these particulars, and not only declared the *subpoena duces tecum* sufficient and valid, but thought it so far removed in its nature from a search warrant that its use could not be deemed within the restrictive force of the 4th Amendment. And he went so far as to hold that if the 5th Amendment did not apply to corporations, neither did the 4th Amendment apply to them. But no other member of the court agreed with him.

These three propositions summarize the holding of the Court: (1) A *subpoena duces tecum* must be as specific as a search warrant, (2) The 4th Amendment applies to such a subpoena, and (3) A corporation may avail itself of the protection of the 4th Amendment as fully as may an individual.

E. R. S.

GOODS DAMAGED BY ACT OF GOD BECAUSE OF A CARRIER'S NEGLIGENT DELAY.—There is a sharp conflict of authority among the cases upon the question of a carrier's liability for goods damaged by an act of God, where such injury would not have occurred but for the carrier's negligent delay in transporting the goods. An examination of the cases directly in point shows that they are about evenly divided, although it has been said that the greater number of cases hold the carrier not liable under such circumstances (GODDARD'S OUTLINES OF BAILMENTS AND CARRIERS, § 248), that the preponderance of authority favors the carrier (6 CYC. 382), and that the weight of authority is in accordance with this view (SCHOULER ON BAILMENTS, § 348, n. 5.)

The courts which support the rule that the carrier is not liable, base their decisions upon the theory of proximate cause, holding that the act of God, and not the negligent delay of the carrier, is the proximate cause of the injury. "A man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may, on this account, be seen by ordinary forecast. and not for those which arise from a conjunction of his

fault with other circumstances that are of an extraordinary nature." *Morrison* v. *Davis* (1852) 20 Pa. St. 171. This rule prevails in the Supreme Court of the United States, the Federal courts, Massachusetts, Mississippi, North Carolina, Ohio, Pennsylvania and Virginia. It also appears to be the present doctrine of the appellate courts of Missouri.

Those courts which hold the carrier liable maintain that the act of God must not only be the proximate, but also the sole, cause of the loss, and that the carrier is not excused by the act of God where the injury would not have occurred but for its negligent delay in transportation. "To excuse the carrier, the act of God must be the sole and immediate cause of the injury. If there be any co-operation of man, or any admixture of human means, the injury is not, in a legal sense, the act of God." *Michaels* v. *New York Cent. Ry. Co* (1864) 30 N. Y. 571. "In order to avail himself of such exemption, he must show that he was himself free from fault at the time. His act or neglect must not contribute or concur to produce the injury, and if he departs from the line of his duty and violates his contract, and, while thus in fault, the goods are injured by an act of God, he is not protected." *Dunson* v. *New York Cent. Ry. Co.* (1870), 3 Lans. (N. Y.) 265. This doctrine is followed in Alabama, Illinois, Iowa, Kentucky, Louisiana, New York and West Virginia. It seems to be the doctrine of the Missouri Supreme Court, but the appellate courts of that State at present hold the contrary view. It is claimed that this rule is based upon grounds of public policy. 36 Am. St. Rep. 838 (Note).

The Supreme Court of Iowa, in the recent (Mar. 9, 1906) case of *Green-Wheeler Shoe Co.* v. *Chicago, etc., Ry. Co.,* 106 N. W. Rep. 498, has adopted the rule holding the carrier liable, thus taking the position said to be against the weight of authority. In that case, which was tried upon an agreed statement of facts, the defendant was guilty of negligent delay in forwarding the goods of the plaintiff from Fort Dodge to Kansas City, where they were lost or injured on May 30, 1903, in the great flood which visited Kansas City and vicinity at that time. The flood was so unusual and so extraordinary as to constitute an act of God, but if there had been no negligent delay the goods would not have been caught in the flood nor damaged thereby. In the absence of any previous express declaration in Iowa upon the precise point involved, the court felt free to adopt the rule which seemed to it just and reasonable. The Court said: "The real difficulty seems to be in determining to what extent, if at all, it is necessary that the negligent party must have been able to foresee and anticipate the result of his negligent act in order to render him liable for the consequences thereof rsulting from a concurrence of his negligence and another cause for which he is not responsible. In an action on contract the party who is at fault is only liable for such consequences as arise according to the usual course of things from his breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time the contract was made as the probable result of the breach. *Hadley* v. *Baxendale* (1854) 9 Exch. 341. * * * But in an action for tort, and the present action is of that character, recovery is not limited to the consequences within the contemplation of the parties or either of them, but includes all of the consequences 'resulting by ordinary natural sequence, whether

foreseen by the wrongdoer or not, provided that the operation of the cause of action is not interrupted by the intervention of an independent agent or overpowering force, and that but for the operation of the cause of action the consequence would not have ensued.' SEDGWICK, ELEMENTS OF DAMAGES, 54. It is true that, for the purpose of determining whether the injury suffered by the party complaining was the natural and probable result of the wrong complained of, a convenient test is to consider whether such a result might have been foreseen as the consequence of the wrong, but it is not necessary 'that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough that it now appears to have been the natural and probable consequence.' *Hill* v. *Winsor* (1875) 118 Mass. 251. * * * Now, while it is true that defendant could not have anticipated this particular flood, and could not have foreseen that its negligent delay in transportation would subject the goods to such a danger, * * * defendant should have foreseen, as any reasonable person could foresee, that the negligent delay would extend the time during which the goods would be liable in the hands of the carrier to be overtaken by some such casualty, and would therefore increase the peril that the goods should be thus lost to the shipper." As a further argument in support of its conclusion, the court calls attention to an analogy which it claims exists between deviation and delay. It is a well settled rule that if the carrier transports the goods over some other route than that specified in the contract, or reasonably within the contemplation of the parties, he must answer for any loss or damage occurring during such deviation, although it is from a cause which would not in itself render him liable. *Davis* v. *Garrett* (1830) 6 Bing (C. P.) 716; *Crosby* v. *Fitch* (1837) 12 Conn. 410; *Powers* v. *Davenport* (1845) 7 Blackf. (Ind.) 497. In brief, then, the court bases its decision upon two grounds: First, that this is a tort action for which a different rule of damages obtains than in a contract action; and second, that the rule of liability which is applied in cases of deviation should be applied to cases of delay, because the two situations are analogous.

That the liability for a tort extends to more consequences of the wrongful act than the liability for a breach of contract, is a well settled rule of law. This principle, however, does not seem to have been considered in the cases holding the carried not liable, possibly because many of them were contract actions. A good many of these cases cite approvingly the rule laid down in the famous case of *Hadley* v. *Baxendale* (1854) 9 Exch. 341, but, of course, this rule is strictly applicable only to contract actions. "The duties of common carriers with respect to the transportation of persons or property is a duty independent of contract." RAY, PASSENGER CARRIERS, 19.

The analogy between deviation and delay has been recognized by the Supreme Court of the United States in the case of *Constable* v. *National Steamship Co.* (1894) 154 U. S. 51, 14 Sup. Ct. Rep. 1062, 1068. It is also spoken of in HUTCHINSON ON CARRIERS, (2nd Ed.) § 200. It is difficult to see wherein a substantial difference lies between the legal effect of the two sets of circumstances. It is claimed that the distinction lies in that a material deviation amounts to a conversion, which makes the carrier absolutely liable; but it is not apparent why a material delay would not amount to a conversion also. The truth is that the idea of conversion does not enter into the cases which

have established the law of deviation; their decisions are based upon the ground that "the carrier is bound to proceed, without deviation from the usual and ordinary course, to the place of delivery." *Bennett* v. *Byram* (1859) 38 Miss. 17; *Crosby* v. *Fitch* (1837) 12 Conn. 410; *Powers* v. *Davenport* (1845) 7 Blackf. (Ind.) 497. "No wrongdoer can be allowed to apportion or qualify his own wrong, and * * * as a loss has actually happened whilst his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It might admit of a different construction if he could show, not only that the same loss might have happened, but that it must have happened if the act complained of had not been done." *Davis* v. *Garrett* (1830) 6 Bing. (C. P.) 717. It is clear that no idea of conversion prevailed in that case, a case which is the pioneer upon the law of deviation by a carrier. Again, it is difficult to see why the deviation by the carrier in the one case is the proximate cause of the loss, while the act of God is the proximate cause in the other. It would seem that the negligent delay by the carrier is just as much the proximate cause of the loss in the one case, as the deviation is in the other. It is not contended that the law of deviation is theoretically correct, but it is contended that it is inconsistent to hold the carrier liable in the case of deviation, and not liable in the case of delay.

The case of *Bibb Broom Corn Co.* v. *Atchison, etc., Ry. Co.* (1905) 102 N. W. Rep. 709, is authority for the statement that there is no conflict in the cases regarding perishable goods, the carrier uniformly being held liable, and that the conflict arises only in reference to non-perishable goods. The court refers especially to damage by freezing. An examination of such cases, however, shows that the statement is not strictly accurate, although the majority of the cases bear it out. *Mich. Cent. Ry. Co.* v. *Burrows* (1875) 33 Mich. 6; *Herring* v. *Chesapeake, etc., Ry. Co.* (1903), 101 Va. 778.

One case makes a distinction between delay in forwarding and delay in transportation, holding the carrier not liable for the former. It is, therefore, authority for neither side. *Lamont* v. *Nashville, etc., Ry. Co.* (1871), 56 Tenn. (9 Heisk.) 58.

The acts of God involved in the cases divide themselves into four main classes: Floods, fires, freezing, storms. The following is a list of the cases upon both sides of the question. Only those cases, however, relating to common carriers of goods are listed; cases relating to common carriers of live stock, and to baggage, are not included. CARRIER LIABLE. *Floods: Michaels* v. *New York Cent. Ry. Co.* (1864) 30 N. Y. 564; *Read* v. *Spaulding* (1864) 30 N. Y. 630; *Dunson* v. *New York Cent Ry. Co.* (1870) 3 Lans. (N. Y.) 265. *Fires: Condict* v. *Grand Trunk Ry. Co.* (1873) 54 N. Y. 500; *McGraw* v. *Balt., etc., Ry. Co.* (1881) 18 W. Va. 361; *Meyer* v. *Vicksburg, etc., Ry. Co.* (1889) 41 La. Ann. 639; *Hernsheim* v. *Newport News, etc., Co.* (1896) 18 Ky. L. Rep. 227, 35 S. W. Rep. 1115; *Louisville, etc., Ry. Co.* v. *Gidley* (1898) 119 Ala. 523. *Freezing: Mich. Cent. Ry. Co.* v. *Curtis* (1875) 80 Ill. 324; *Vail* v. *Pacific Railroad* (1876) 63 Mo. 230; *Armentrout* v. *St. Louis, etc., Ry. Co.* (1876) 1 Mo. App. 158; *Hewett* v. *C., B. & Q. Ry. Co.* (1884) 63 Ia. 611. CARRIER NOT LIABLE. *Floods: Morrison* v. *Davis* (1852) 20 Pa. St. 171;

Denny v. *New York Cent. Ry. Co.* (1859) 79 Mass. 481 (13 Gray); *Memphis R. R. Co.* v. *Reeves* (1869) 77 U. S. 176 (10 Wall); *Grier* v. *Railroad* (1904) 108 Mo. App. 565; *Moffatt Commission Co.* v. *Union Pacific Ry. Co.* (1905) 88 S. W. Rep. 117 (Mo. App.). *Fires: Hoadley* v. *Northern Trans. Co.* (1874) 115 Mass. 304; *Scott* v. *Baltimore, etc., Steamship Co.* (1884) 19 Fed. Rep. 56; *Thomas* v. *Lancaster Mills* (1896) 71 Fed. Rep. 481; *Yazoo, etc., Ry. Co.* v. *Millsaps* (1899) 76 Miss. 855; *General Fire Extinguisher Co.* v. *Carolina, etc., Ry. Co.* (1904) 49 S. E. Rep. (N. C.) 208. *Freezing: Mich. Cent. Ry. Co.* v. *Curtis* (1875) 33 Mich. 6; *Herring* v. *Chesapeake, etc., Ry. Co.* (1903) 101 Va. 778. *Storms: Daniels* v. *Ballentine* (1872) 23 Ohio St. 532. R. G. H.

THE EFFECT OF DOGMATIC CHANGES UPON THE LEGAL STATUS OF A CHURCH.—The devolution of property held by a church, or in trust for a church, in the event of a split in the organization has been the occasion of much un-Christian controversy. The case of *Christian Church of Sand Creek et al.* v. *Church of Christ of Sand Creek et al.*, decided February 21, 1906, in the Illinois Supreme Court—76 N. E. Rep. 703—and the case of *Free Church of Scotland et al.* v. *Overtoun et al.* [1904] A. C. 515, are the most recent adjudications in England and America upon this subject. A comparison of the two cases would seem to indicate a greater similarity in the law of the two countries than has sometimes been thought to exist. The question involved is the execution of a trust. The church funds are a trust and should be administered in accordance with the wish of the donor. If the donor expressly provides that the property shall be devoted to the support of some specific form of religious doctrine or polity then his wish will be enforced, however difficult the questions may be. As to this there is no dispute. Often, however, the gift is to a specific church without any expressed qualification as to doctrine. The question then arises as to which of two rival branches of the former organization is entitled to the fund. For the purpose of settling this property question the courts will then determine which is the original organization—a question which they would otherwise decline to adjudicate.

The Sand Creek controversy arose in this wise. A congregation of the Disciples of Christ or "Christian" church was organized at Sand Creek in 1834. In government this denomination is purely congregational, and it has, says the opinion, "no creed except the Bible; the view of the followers of Alexander Campbell [the founder] being that, where the Bible speaks, the congregation and its several members are authorized to speak, but where it is silent the congregation and the members thereof should remain silent." Since 1849 there has been throughout the denomination a division of opinion as to the practice to be adopted with reference to matters on which the Bible is silent, such as the use of instrumental music in the services, employment of a minister at a fixed salary and for a fixed time, organizations subsidiary to the church, and church fairs. One view is that in such matters the silence of the Bible should be construed as a positive prohibition; the other is that its silence makes their employment permissive at the discretion of the congregation.